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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re I.M., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. DENNIS M., Defendant and Appellant.	A153446 (Alameda County Super. Ct. No. JD02904801)

This is an appeal from the jurisdictional and dispositional findings and orders in a dependency matter involving minor, I.M. (minor). Minor's father, Dennis M. (father), contends the juvenile court's jurisdictional and dispositional findings and orders lack the support of substantial evidence. Father also contends the juvenile court and respondent Alameda County Social Services Agency (agency) failed to fully comply with the notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA). We affirm.[1]

[1] Mother has not appealed these orders, and so is mentioned only as relevant to the factual and procedural background of this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On December 5, 2017, the agency filed a juvenile dependency petition pursuant to Welfare and Institutions Code section 300, subdivision (b), alleging, among other things, that six-day-old minor had suffered or was at substantial risk of suffering serious physical harm or illness due to his parents' failure or inability to adequately supervise or protect him, willful or negligent failure to provide him with adequate medical treatment, and inability to provide him with regular care due to their substance abuse (hereinafter, petition).[2] Specifically, the petition alleged that: (1) parents have a substance abuse issue (which they denied), preventing them from adequately caring for minor and placing minor at substantial risk of harm as demonstrated by minor's positive toxicology at birth for opiates, methadone and marijuana, as well as a May 2017 incident during which law enforcement found heroin and crack in parents' home and within reach of N.M., minor's one-year-old sibling; (2) mother received no prenatal care during her pregnancy with minor; (3) mother refused to allow minor to be treated at the Neonatal Intensive Care Unit (NICU) and requested his discharge against medical advice; and (4) the agency had made multiple unsuccessful attempts to remove N.M. since May 2017 due to allegations of abuse and neglect.

The agency's detention report dated December 6, 2017, stated that minor had been delivered into protective custody by the Berkeley Police Department on December 2, 2017, after Dr. Lim of Alta Bates Hospital (hospital) in Berkeley reported minor's positive toxicology and ordered minor to be taken to the NICU for care and observation. Hospital staff reported that mother was upset and refusing to allow minor to be taken to the NICU, and denied any substance abuse issue. Father was reported to be agitated.

This same day, the agency met with parents at the hospital. Father, who stayed mostly quiet during the interview, reported that he had a medical marijuana card and was smoking marijuana daily to address his pain from a back injury. Mother denied parents

[2] Unless otherwise stated, all statutory citations herein are to the Welfare and Institutions Code.

abused drugs and insisted minor's positive toxicology at birth was the result of fentanyl prescribed to her at the hospital during her delivery. Mother also stated that she had a medical marijuana card and occasionally (once or twice monthly) used the substance to combat nausea during her pregnancy. When the social worker told mother that neither the prescribed fentanyl nor the medical marijuana would explain why minor tested positive for methadone, mother explained a friend had given her two Tylenol pills on the way to the hospital for pain that mother later discovered were actually methadone pills. In addition, mother was unable to provide the social worker with any documentation to prove she received consistent prenatal care for minor. When asked about the May 2017 incident during which drugs were found in their home, parents insisted the police unlawfully entered their home. The social worker then requested to visit N.M. and the family's home, allowing parents two hours to make the necessary arrangements. Parents, however, told the social worker that N.M. was unavailable because he was staying with the maternal grandparents. Both parents also spoke about various contacts they had had with the agency that they deemed harassment.

After their meeting, the social worker called parents to again try to schedule a home visit, but mother insisted they wait until her discharge from the hospital so that parents could be present.

The report also noted the family had a CPS referral history that included 11 unsuccessful attempts to remove one-year-old N.M. (minor's sibling) for abuse/neglect. The agency had not been able to gain entry into the home, and the Oakland Police Department had refused to use force entry out of safety concerns. Among these referrals were: a December 2016 referral for physical abuse and neglect arising from a severe burn on N.M.'s arm that was closed as inconclusive; and a May 2017 referral for general neglect that was substantiated and generated a warrant to remove N.M. after drugs were found with his reach.

On December 5, 2017, Dr. Halikas reported to social worker Maresha Wagner that minor remained in the hospital and was suffering from withdrawal. Medical staff recommended that minor be treated with morphine and constantly held so he did not

become distressed. Parents were upset minor had been treated with morphine and refused to consent to this form of treatment.

Also on December 5, 2017, Wagner talked by telephone to mother, who stated that just prior to minor's birth, a friend gave her what could have been either Tylenol or methadone. Mother also said she did not know there were drugs in her home on May 17, 2017, when the police conducted their search. She then implied father brought drugs into the home (referencing a conversation in which she told him never to bring drugs home again) and reported telling father: "Maybe you don't do them [drugs], but you sell them." Mother then said that father had told her he regretted not listening to her.

Wagner spoke to father the same day. Father insisted the drugs found on May 17 belonged to a visitor to their home, namely, a customer visiting father's barber shop, which he ran out of the back of their home. Father said he did not understand why minor was taken into protective custody.

Temporary detention orders were issued on December 6, 2017, and a continued detention hearing was held the next day, on December 7. Neither parent appeared at the December 7 hearing. The court detained minor, adopted the agency recommendations, and granted authorization over parents' objection for minor's doctors to prescribe medication for his withdrawal symptoms.

In anticipation of the upcoming combined jurisdiction/disposition hearing, the agency filed a report recommending that the court sustain the allegations in the petition, continue minor's out-of-home placement, and provide mother reunification services. Such services were not recommended for father, who remained an alleged father. Meanwhile, minor remained hospitalized.

This report noted that, on December 7, a referral was submitted for substance abuse testing and assessment. This same day the hospital reported that mother was in fact given fentanyl at the hospital but that fentanyl would not have caused minor's withdrawal symptoms. On the other hand, it may have caused him to test positive for opioids. Meanwhile, minor had started morphine treatment for his withdrawal symptoms.

On December 15, 2017, Wagner spoke by phone with mother, who told her that parents were taking turns caring for minor in the hospital. Mother also appeared willing to allow the agency's home visit. When asked again about the drugs found in her house, mother responded: "Sometimes you don't know every aspect of your husband," and "I can't control what my husband does and he can't control what I do." At the same time, mother denied either parent used drugs, and noted the charges against father had been dismissed. When Wagner reminded mother she had previously stated that drugs had been found on a top shelf, mother corrected Wagner: "No. I said if there were drugs, they would have been up away on a shelf." She did not believe father should be tested for drugs.

According to this report, on December 18, 2017, Wagner left a voicemail for father, who responded with a text message. When Wagner replied by text message, asking in regards to father's availability to talk, she received no response. The next day, Wagner left father another voicemail, but again received no response.

The report indicated both parents had a criminal history in Alameda County. Father, in particular, had been convicted on March 17, 2017, for misdemeanor possession of marijuana to sell or transport to sell.

On January 9, 2018, the court elevated father to presumed father status, and his counsel requested that minor be released to father or a suitable relative. The court granted discretion to the agency to release minor to either parent if the agency found it in minor's best interest, taking consideration of efforts the parents may or may not have made in accordance with their case plan.

On January 19, 2018, the agency filed an addendum report recommending that the court sustain the allegations in the petition and that both parents receive reunification services. At that time, minor remained hospitalized in the NICU. The addendum report further indicated that on December 20 Wagner had spoken at court with father, who had stated that he was a good father who had never before been involved with Child Protective Services. Wagner advised father of the benefit of demonstrating his sobriety by agreeing to drug testing and assessment. Father agreed to test at Options Recovery

Services. However, the agency thereafter had trouble connecting with father. Wagner finally spoke by phone to father on January 12, 2018, and while father told her minor was improving and that he and mother were caring for him at the hospital, he had not yet drug tested. Wagner again gave father the contact information for Options Recovery Services. She also advised him to participate in parenting classes to develop safe parenting skills and discussed with him the agency's concern regarding the drugs found in parents' home. Father agreed to contact the parenting education program, while insisting he did not need to take a parenting class.

Wagner continued to have difficulty reaching father, along with her supervisor, but finally spoke by phone with him again on January 18, 2018. Father reported that mother had moved out of their home on January 2 and had been staying with friends or sleeping at a motel. Relatives had been caring for N.M. Wagner's supervisor told father the agency had struggled to schedule a home visit with the family and that minor would be released from the hospital soon under foster care. Father acknowledged he still had not been drug tested, telling Wagner his attorney had told him that until he was elevated to presumed father status, there was nothing he could do. Wagner's supervisor responded that he had in fact been elevated to presumed father status on January 9, and Wagner added that he had been referred for drug testing in December 2017. Father did not respond and the call was disconnected.

The addendum report also indicated that, on December 20, 2017, the agency had received a copy of the police report from the May 17, 2017 incident at parents' home. This police report stated that an Alameda County deputy sheriff was called to parents' home to assist in a stolen vehicle recovery. When the deputy sheriff arrived, he found father in handcuffs and about to be searched under the terms of his probation. A search of father's pockets and waistband ultimately revealed: eight small balloons of brown heroin; ten small bags of methamphetamine; six small bags of heroin; and a cigarette package containing marijuana. In father's left sock, the deputy sheriff found a small straw and folded paper envelope containing 1.1 grams of heroin. Father told the deputy, "That's just some drugs I use." Thus, in total, law enforcement found father in

possession of 12.7 grams of heroin and 4.3 grams of methamphetamine. In addition, law enforcement found in the home several small bags of heroin and methamphetamine on a dresser in the master bedroom (within reach of minor's sibling), the keys from the recovered stolen vehicles, and a box of ammunition for a .380-caliber firearm. Father was arrested and taken into custody. The addendum noted that, despite this police documentation, father continued to deny there were any drugs in parents' home in May 2017.

Also according to the addendum report, on December 21, social worker Sylvia Joyner received an urgent call from the hospital and was told by a hospital social worker that parents were irate, yelling and cursing and threatening to take minor from their care. While insisting they did not really want to take minor, parents stated they wanted to see what would happen if they tried. Joyner counseled the social worker to provide parents a copy of the search and seizure warrant and, if they left with minor, to engage security protocols.

In addition, Shawna Lynch of Options Recovery Services reported that she had spoken to father and attempted to schedule him for a drug test and assessment, but that father had told her he had broken his foot and would need to call her back. Lynch tried to call father again on December 27, but the call was disconnected. Lynch then called him again on January 17, 2018, leaving a message for father to call her back. Darwin Rivera from the parenting education program responded similarly that he had reached out to father several times to enroll him in classes, but that father had not responded to his voicemail messages.

On January 3, 2018, maternal grandparents scheduled a home assessment for the next day. However, on the day of this assessment, they canceled it and advised the agency they were "declin[ing]" to continue with the assessment and requested visits with minor. On January 11, minor's paternal grandmother reported she would not be able to care for him.

On January 4, 2018, the hospital social worker reported that parents had been taking turns spending the night with minor and appeared to be bonding well with him and

having positive visits. Minor continued to be hospitalized and remained on morphine, although his dosage was being reduced so that he could eventually leave the hospital morphine-free.

On January 11, 2018, the agency received prenatal records from West Oakland Health Council indicating that mother had only one visit while pregnant with minor.

On January 23, 2018, the contested jurisdiction/disposition hearing was held and the aforementioned reports were admitted into evidence. Wagner, assigned to the case since December 4, 2017, testified that minor had not been placed with father due in part to the May 2017 incident during which drugs were found in parents' home in a place accessible to one-year-old N.M. and on father's person. While father was not ultimately convicted for the charges brought for this incident, Wagner's search of police records indicated he had been convicted of possession of marijuana for sale in March 2017.

Wagner further testified that father had consistently denied his involvement with drugs, yet he had not taken a test or been assessed to determine his sobriety despite Wagner's referrals and advice to him to do so if he wanted to reunify. Wagner recounted her many unsuccessful attempts to get father to drug test, as well as her many unsuccessful efforts to schedule a home visit.

Father also testified, confirming that mother no longer lived at home, that he was not using drugs, and that he wanted minor to come home. He also denied selling drugs or telling the agency that he ever used marijuana. In particular, father denied having any drugs on his person or in his home on May 17, 2017, and insisted police found the individual they were looking for and that because this individual did not admit the drugs were his, everyone present (including him) had been arrested. Father's position was that the police report was untrue in stating that heroin, methamphetamine and marijuana had been found on his person and in stating that drugs had been found in his bedroom. He acknowledged that, at the time, he was on searchable probation, but testified that the police found nothing on his person after searching him. He believed the CPS investigation stemming from the May 2017 incident had been closed.

Father also acknowledged being referred to the Options Recovery Services program for drug testing, but testified he had tested at another facility instead, on January 10, 2018. He had not disclosed the results or provided any documentation regarding this test to the agency. Father also claimed to have attended four meetings, two parent orientation meetings, two father support meetings and two NA meetings. He insisted the social worker only attempted to schedule a home visit once.

In addition, father testified that marijuana, which he last used on September 16, 2017, was his drug of choice, and that he never used heroin or cocaine. According to father, mother, with whom he had been in an eight-year relationship, did not use drugs aside from marijuana occasionally. Moreover, they were surprised minor was born with drugs in his system. He acknowledged minor was in the NICU because of his positive toxicology, but insisted he had never been present when minor was going through withdrawal, which only "supposedly" happened when parents were absent.

Mother then testified, and also denied using heroin or methadone. Mother admitted a prior arrest for drug possession in 2010. Mother also admitted minor's positive toxicology at birth, but insisted it was a result of the hospital giving her fentanyl during her labor and two methadone pills she took that she believed were Tylenol, which a friend gave her at a baby shower a few days before minor's birth. She also acknowledged using marijuana during her pregnancy for morning sickness. She denied making a statement that father sold drugs and did not know why minor had been hospitalized for over a month.

Following the contested jurisdiction/disposition hearing, the juvenile court found by clear and convincing evidence that minor's placement with either parent would be detrimental to his safety, protection or physical well-being. In doing so, the juvenile court expressed concern about parents' credibility in court and their failure to provide proof of drug testing. The juvenile court thus ordered minor to be committed to the agency's care, custody and control for suitable placement, and ordered visitation and limited reunification services for mother and father. The court then set the matter for a

six-month status review hearing to occur no later than July 23, 2018. Father filed a timely notice of appeal.

DISCUSSION

Father raises two primary issues on appeal. First, father contends the juvenile court's jurisdictional and dispositional orders are not supported by substantial evidence. Second, he contends the juvenile court and the agency failed to meet their respective duties under the ICWA. We address these issues in turn.

I. *Substantial evidence supports the court's jurisdictional findings.*

Father contends there was insufficient evidence to support the jurisdictional findings that minor came within the provisions of section 300, subdivision (b). Section 300, subdivision (b) authorizes a minor to be adjudged a dependent of the juvenile court where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) Specifically, father challenges the court's finding that minor has suffered or faces a substantial risk of suffering serious physical harm or illness due to his substance abuse issue. In addition, father challenges the finding that minor comes within this provision because the agency has repeatedly failed in its attempts to remove N.M., minor's young sibling, insisting the agency's failures in this regard actually prove minor would not be exposed to a substantial risk of harm if left in his care.

The legal framework is well established. "At a jurisdictional hearing, the juvenile court ' "shall first consider . . . whether the minor is a person described by Section 300, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him or her within the jurisdiction of the juvenile court is admissible and may be received in evidence. However, proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 300." ' [Citation.] [¶] 'While

evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' [Citation.] Thus previous acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur." (*In re Ricardo L*. (2003) 109 Cal.App.4th 552, 564–565.)

On appeal, "we review the evidence most favorably to the court's order—drawing every reasonable inference and resolving all conflicts in favor of the prevailing party—to determine if it is supported by substantial evidence. [Citation.] If it is, we affirm the order even if other evidence supports a contrary conclusion." (*In re N.M.* (2011) 197 Cal.App.4th 159, 168.) Further, while the child welfare agency must prove by a preponderance of the evidence that the child who is the subject of the petition comes under the court's jurisdiction (§ 355, subd. (a); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248), on appeal, the parent has the burden of showing there is insufficient evidence to support the order (*In re N.M.*, *supra*, 197 Cal.App.4th at p. 168). And where, as here, a dependency petition alleges the existence of multiple grounds for making the minor a juvenile dependent, the reviewing court may affirm the dependency court's finding of jurisdiction so long as any one of these grounds is supported by substantial evidence. (*In re Alexis E*. (2009) 171 Cal.App.4th 438, 450–451; accord, *In re Ashley B.* (2011) 202 Cal.App.4th 968, 979.)

Having reviewed the record at hand in a light favorable to the juvenile court's order, we conclude it contains sufficient evidence to sustain the dependency petition under section 300, subdivision (b). Indeed, there is a wealth of evidence demonstrating father has a "substance abuse issue" that interferes with his ability to provide adequate care for minor—a newborn baby born with positive toxicology for opiates, methadone and marijuana—and that places minor at a substantial risk of physical harm or illness. First and foremost, in May 2017, police found father in possession of 12.7 grams of heroin and 4.3 grams of methamphetamine and, in addition to these drugs, found several small bags of heroin and methamphetamine on a dresser in a bedroom accessible to minor's young sibling. At the time, father told a police officer that the small straw and

folded paper envelope containing 1.1 grams of heroin found in his left sock were "just some drugs I use." As father notes, he was arrested yet never convicted as a result of this incident, and later testified that the drugs were not his and that the contemporaneous police report was false. The juvenile court, however, accepted this evidence and rejected father's testimony. The court was also quite reasonably concerned with father's unwillingness to drug test in order to prove his sobriety, particularly in light of his vehement denials of using drugs in the first place. We decline to second-guess the juvenile court's findings, particularly in light of the fact that father appeared at the hearing and testified, giving the judge ample opportunity to assess his veracity. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 996 [credibility determinations are " 'the exclusive province of the trial judge' "].) Thus, viewed in this light, the evidence supporting the court's assertion of dependency jurisdiction was ample. (*In re Yolanda L.* (2017) 7 Cal.App.5th 987, 993 ["Leaving drugs or drug paraphernalia within [a] child's reach is an example of negligent conduct that will support section 300, subdivision (b) dependency jurisdiction"].) As the Legislature has declared: " 'The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.' " (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.)

Accordingly, based on father's recent criminal activity and failure to prove his sobriety by participating in drug testing and assessment, the juvenile court could reasonably find minor was substantially likely to suffer serious physical harm or illness due to father's substance abuse issue and resulting inability to provide minimally adequate care, notwithstanding father's arguments that minor's sibling (N.M.) has never been harmed or removed. "[S]ection 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a 'substantial risk' that the child will be abused or neglected. The legislatively declared purpose of these provisions 'is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and

physical and emotional well-being of children *who are at risk of that harm*.' (§ 300.2, italics added.) 'The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.' [Citation]" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)[3]

Finally, because we reject father's appeal of the jurisdictional findings on the merits, we need not address the agency's argument that we should dismiss his challenge as moot given that the unchallenged jurisdictional findings as to mother will continue to support dependency jurisdiction.[4]

II. *Substantial evidence supports the court's dispositional findings.*

Father also raises an evidentiary challenge to the juvenile court's dispositional order removing minor from his custody after finding clear and convincing evidence that minor's return home would cause substantial danger to his physical health, safety, protection, or physical or emotional well-being, and that there were no reasonable alternative means to protect him. According to father, this order was not supported by the evidence, noting again that minor's sibling remained in his care and was not a dependent. He also contends the juvenile court failed to consider other reasonable means to protect minor that would have allowed him to stay in parents' home. For example, father contends the court could have conditioned minor's remaining at home with their

[3] Indeed, the fact that father fails to see the potential for significant harm to minor arising from his involvement with drugs is by itself alarming and reinforces the appropriateness of the juvenile court's exercise of jurisdiction in this case. (Cf. *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1376 [evidence failed to support finding that minor was at substantial risk of suffering serious harm where, at the time of the jurisdictional hearing, "parents had recognized the inappropriateness of their behavior and made good faith efforts to alleviate the problem"].)

[4] We simply note for the record that several courts have rejected the agency's argument given that the appealing parent continues to have a substantial interest in having the findings made against him or her reviewed. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762–763; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 ["refusal to address such jurisdictional errors on appeal by declaring the case moot has the undesirable result of insulating erroneous or arbitrary rulings from review"].)

agreement that mother continue to live outside the home or father's agreement to drug test and/or enroll at a substance abuse treatment facility.

Section 361, subdivision (c) provides in relevant part: "(c) A dependent child shall not be taken from the physical custody of his or her parents, guardian or guardians, or Indian custodian with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5) . . . :

"(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody. . . ." (§ 361, subd. (c)(1).)

"Our review on appeal follows the ordinary rules for substantial evidence, notwithstanding that the finding below had to be made by clear and convincing evidence. [Citations.] Viewing the evidence in the light most favorable to the finding, and presuming in its support the existence of every fact the trier could reasonably deduce, we ask whether any rational trier of fact could have made the finding by the requisite standard." (*In re H.E.* (2008) 169 Cal.App.4th 710, 723–724.)

All of the evidence we have already set forth that supports the juvenile court's exercise of dependency jurisdiction also supports its decision to remove minor from father's care. (See *In re Cole C.* (2009) 174 Cal.App.4th 900, 917 [court's jurisdictional findings are prima facie evidence that a child cannot safely remain in the home].) And while father condemns the juvenile court for not considering reasonable alternatives, like requiring that he drug test or seek substance abuse treatment, his argument utterly disregards the fact that the agency referred him multiple times to a recovery program for drug testing and assessment, and yet he failed to follow through with them. As such, we reject his claim that the juvenile court failed any of its duties under section 361, subdivision (c)(1). (*Id.* at p. 918 [juvenile court has "broad discretion" in considering alternatives to removal and making a dispositional order]; *Ross v. Superior Court* (1977)

19 Cal.3d 899, 913 [reviewing court must presume the lower court has properly performed its legal duties in the absence of contrary evidence].) Simply stated, there is clear and convincing evidence in this record that minor's health and safety require his removal. The dispositional order thus stands.

III. *ICWA Compliance.*

Lastly, father contends the agency and the juvenile court failed to discharge their respective duties under the ICWA to inquire whether minor is or may be an Indian child, and thus asks this court to remand for compliance.

"The ICWA (25 U.S.C. §§ 1901-1963) was enacted for ' "the protection of the best interests of Indian children, and the promotion of stable and secure Indian tribal entities. [Citation.]" ' (*In re Crystal K.* (1990) 226 Cal.App.3d 655, 661 [276 Cal.Rptr. 619].)" (*In re Riva M.* (1991) 235 Cal.App.3d 403, 410.) "[T]he ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)–(c), 1912–1921.) 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . .' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) Under the ICWA, an Indian tribe has the right to intervene or a qualified right to transfer a proceeding to its jurisdiction in certain involuntary actions involving children residing off the reservation. (25 U.S.C. § 1911; *In re Riva M.*, *supra*, 235 Cal.App.3d at p. 410; *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, 1616–1617.) Accordingly, parental rights may not be terminated in the absence of a determination, supported by evidence beyond a reasonable doubt, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (*In re Riva M.*, *supra*, 235 Cal.App.3d at p. 410; 25 U.S.C. § 1912(a), (f).)

"Concerning notice, the ICWA provides: '[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe,

by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the [Bureau of Indian Affairs (BIA)] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the [BIA] . . . .' (25 U.S.C. § 1912(a); see also 25 U.S.C. §§ 1a, 1903(11).)" (*In re Jonathon S., supra,* 129 Cal.App.4th at p. 338; see also *In re Junious M.* (1983) 144 Cal.App.3d 786, 793.) "To enforce this notice provision, the ICWA further provides: 'Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section[] . . . 1912 . . . of this title.' (25 U.S.C. § 1914.)" (*In re Jonathon S., supra,* 129 Cal.App.4th at p. 338; accord, *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469 ["notice [is] a 'key component of the congressional goal to protect and preserve Indian tribes and Indian families.' "].) "When proper notice is not given under the ICWA, the court's order is voidable. (25 U.S.C. § 1914.)" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

Sections 224.2 and 224.3 codify into state law the ICWA guidelines promulgated by the BIA that set forth specific categories of information a state agency should include in the notice required under the ICWA.[5] (25 C.F.R. § 23.11 (2018); Assem. Com. on

[5] At the time the juvenile court made its jurisdictional and dispositional orders, former section 224.2 provided in relevant part:

"(a) If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the minor's tribe and comply with all of the following requirements:

"(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required. [¶] . . . [¶]

"(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the parents, Indian custodians, or the minor's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.

"(5) In addition to the information specified in other sections of this article, notice shall include all of the following information:

"(A) The name, birthdate, and birthplace of the Indian child, if known.

"(B) The name of the Indian tribe in which the child is a member or may be eligible for membership, if known.

"(C) *All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known*. . . ." (Former § 224.2, subd. (a), italics added; added by Stats. 2006, ch. 838, § 31, pp. 6565–6567, repealed by Stats. 2018, ch. 833, § 4, No. 8 West's Cal. Legis. Service, p. 5351, and reenacted as § 224.3 by Stats. 2018, ch. 833, § 7, No. 8 West's Cal. Legis. Service, pp. 5353–5355, eff. Jan. 1, 2019.)

At the time the juvenile court made its jurisdictional and dispositional orders, former section 224.3, in turn, provided in relevant part:

"(a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.

"(b) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following:

"(1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe. [¶] . . . [¶]

"(c) *If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership in and contacting the tribes*

Judiciary, Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended June 14, 2006, p. 12; see also *In re J.T.* (2007) 154 Cal.App.4th 986, 993.)

Here, father contends the agency and juvenile court failed to comply with these rules by not taking additional steps to obtain more information regarding whether minor has Indian heritage once the agency was on notice of his possible Choctaw or Cherokee heritage. The following record is relevant.

On December 2, 2017, the day minor was first delivered into protective custody, the agency inquired of both parents in person whether minor potentially had Indian heritage. At that time, both parents indicated Cherokee ancestry. During the subsequent detention hearing, parents submitted Parental Notification of Indian Status forms, with mother's form stating she had no known Indian ancestry and father's form stating he may have Choctaw ancestry.

On December 19, 2017, the agency filed a Notice of Child Custody Proceeding for Indian Child as to minor. Notice was then sent to parents, the BIA, the Secretary of the Interior and, as to mother, several Cherokee tribes and, as to father, several Choctaw tribes. In the agency's report filed in anticipation of the jurisdiction/disposition hearing, the agency reported mother's statement that she has no known Native American ancestry and father's statement that he may have Choctaw ancestry. This report further stated that ICWA notices were mailed and that the agency intended to resend these notices once father provided more information.

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and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.

"(d) If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer shall provide notice in accordance with paragraph (5) of subdivision (a) of Section 224.2. . . ." (Former § 224.3, italics added; added by Stats. 2006, ch. 8383, § 32, pp. 6567–6569, repealed by Stats. 2018, ch. 833, § 6, No. 8 West's Cal. Legis. Service, p. 5353, and reenacted as § 224.2 by Stats. 2018, ch. 833, § 7, No. 8 West's Cal. Legis. Service, pp. 5353–535, eff. Jan. 1, 2019; accord, Cal. Rules of court, rule 5.481(b)(1).)

On January 23, 2018, once father was named the presumed father, the agency filed an addendum report indicating, among other things, that it was still awaiting information from father regarding his relatives so that it could send out updated ICWA notices.

On this record and given the procedural posture of these proceedings, even were we to find the agency or the juvenile court failed to make the required inquiry regarding minor's ancestry, we would nonetheless deem any such error harmless. Under California law, a " 'violation of ICWA notice requirements may be harmless error, particularly when, as here, the source of the duty to inquire is not [the] ICWA itself but rather . . . a rule of court implementing ICWA.' [Citations.] '[A]ny failure to comply with a higher state standard, above and beyond what the ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error.' [Citation.]" (*In re H.B.* (2008) 161 Cal.App.4th 115, 121–122.) Here, father insists the agency and court had an affirmative duty under sections 224.3 and 224.2 to further inquire into minor's possible Indian status, and to include in the ICWA notices the requisite identifying and contact information for minor's grandparents and other relatives so that proper inquiry could be made. However, the record, viewed in a light favorable to the court's order, reflects that the agency was in fact awaiting further information from father regarding his potential Indian ancestry. And there is nothing in the record indicating that father provided or made any effort to provide to the agency or court this additional information despite indicating on his Parental Notification of Indian Status form that he may have Choctaw ancestry. Nor did father alert the juvenile court to any alleged failure to comply with the ICWA, which would have allowed the court to address this issue below. And while we agree with father that ICWA notice issues may be raised at any time, the fact remains that " 'knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. . . . . Parents cannot spring the [ICWA] matter for the first time on appeal without at least showing their hands. . . .' ([Citation]; cf. *In re J.N.* (2006) 138 Cal.App.4th 450, 461 [41 Cal.Rptr.3d 494] [rejecting contention of harmless error when Department failed to

indicate mother was ever asked about possible Indian heritage].)" (*In re H.B.*, *supra*, 161 Cal.App.4th at p. 122.)

In any event, we note this is not an appeal from an order terminating a parent's parental rights. Rather, at this stage, the juvenile court just set the matter for a permanency planning hearing. As such, opportunity remains for the agency and court to ensure minor's ICWA rights are protected. Accordingly, even if error has occurred, father has not yet suffered any undue prejudice as a result. (See *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 866–867; *Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 261 [" '[N]otice shall be sent whenever there is reason to believe the child may be an Indian child, *and for every hearing thereafter unless and until it is determined that the child is not an Indian child*.' (Rule 1439(f)(5), italics added.) Because the court's duty continues until proper notice is given, an error in not giving notice is also of a continuing nature and may be challenged at any time during the dependency proceedings"].) We thus decline to reverse and remand on this ground.

DISPOSITION

The jurisdictional and dispositional orders of the juvenile court are affirmed.

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Jenkins, Acting P. J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.